

The sole issue for Board determination is whether claimant's accidental injury arose out of his employment.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The claimant had been having problems with his right knee and on October 26, 2009, he had been provided a brace to wear. It was designed to keep his leg straight and claimant stated it caused him to walk stiff legged. There is no allegation in the preliminary hearing record that the knee condition is related to his work for respondent.

The claimant was a custodian at Kansas State University and as part of his job duties he was required to pick up keys from his supervisor's office in the morning and return the keys before 2:30 in the afternoon. On October 28, 2009, as claimant was walking between buildings to return the keys to his supervisor, he fell and broke his left arm.

Initially, claimant thought he just suffered some abrasions and was able to return the keys to his supervisor. He had started home when he realized that his left arm injury was more serious so he sought medical treatment at Mercy Regional Health Center's emergency room in Manhattan. It was determined that claimant suffered a fracture to the radial head and the distal humerus. The severe abrasions kept him from having surgery immediately and he was referred to an orthopedic specialist the next day. Claimant notified his supervisor the next morning following his accident.

Claimant stated that he could not explain what happened but he just fell and broke his arm. But the history of injury that claimant provided at the emergency room on October 28, 2009, indicated that claimant had tripped and fell.<sup>1</sup> And the history of injury claimant provided to Dr. William T. Jones on October 29, 2009, indicated that claimant lost his balance and the right knee brace he was recently fitted with might have contributed to his loss of balance. Dr. Jones' report noted in part:

On 10-28-09 he [claimant] was waking [sic] down a sidewalk at work when he lost his balance and fell on his left arm. He was recently fitted with a hinged brace to the right knee that may have contributed to the loss of balance.<sup>2</sup>

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup> Because the accident occurred while claimant was at work, the accident occurred in the course of

---

<sup>1</sup> P.H. Trans., Resp. Ex. A.

<sup>2</sup> *Id.*, Cl. Ex. 1.

<sup>3</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.<sup>4</sup>

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.<sup>5</sup>

In *Hensley*<sup>6</sup>, the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to *Larson's*<sup>7</sup>, the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working. The Board has consistently held that neutral risks or unexplainable falls occurring in the course of an employee's employment, even though they have no particular employment or personal character, are compensable.<sup>8</sup>

At the preliminary hearing held on February 17, 2010, respondent argued that claimant tripped and fell due to his brace and not because of any condition of his employment and therefore claimant's claim should be denied. Conversely, claimant argued that he suffered a compensable unexplained fall. The ALJ's analysis of the evidence provided in pertinent part:

Respondent contends that Claimant's injury did not arise out of and in the course of his employment because Claimant's fall at work was related to a personal condition, Claimant's right knee brace. In other words, Claimant would not have fallen but for the fact he was wearing a right knee brace.

The Court disagrees. Claimant had an unexplained fall while at work and performing his job. To conclude that but for Claimant wearing a right knee brace, Claimant would not have fallen is speculative. Unexplained falls while at work and

---

<sup>4</sup> See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

<sup>5</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

<sup>6</sup> *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

<sup>7</sup> 1 *Larson's Workers' Compensation* §7.04[1][a] (2009).

<sup>8</sup> See *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

performing duties for Respondent are considered accidents that arise out of and in the course of Claimant's employment.<sup>9</sup>

Here, the fall suffered by claimant has not been explained in this record. Although there are musings in Dr. Jones' record that claimant's brace may have contributed to his fall it is unclear whether that is the doctor's speculation or what he was told by the claimant. In short, the record establishes that claimant was walking on respondent's campus when he fell and suffered an injury. The reason for that fall cannot be discerned from this record. Therefore, it falls under the heading of an unexplained fall and, under Kansas case law, is compensable. In following the majority rule as set out in *Larson's, supra*, this Board Member finds, for preliminary hearing purposes and based upon the record compiled to date, that this neutral risk or unexplained incident where claimant fell is compensable. Accordingly, this Board Member affirms the ALJ's Preliminary Hearing Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>11</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated February 17, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2010.

---

HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Cynthia Patton, Attorney for Claimant  
Bryce D. Benedict, Attorney for Respondent  
Rebecca Sanders, Administrative Law Judge

---

<sup>9</sup> ALJ Order at 2.

<sup>10</sup> K.S.A. 44-534a.

<sup>11</sup> K.S.A. 2009 Supp. 44-555c(k).